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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BARBARA HUBBARD, Plaintiff, vs. HOMETOWN BUFFET, INC. dba HOMETOWN BUFFET #0703; LAKHA PROPERTIES - SAN DIEGO, LLC, Defendants.	Case No. 07cv2303 DMS (RBB) **Notice of Motion and Motion to Amend Plaintiff's Complaint** [Fed. R. Civ. P. 15(a)] Date: May 16, 2008 Time: 1:30 p.m. Room: Courtroom 10, 2nd Floor **[No Oral Argument Unless Requested by the Court]**

TO THE DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 16, 2008 at 1:30 p.m.**,** in the United States District Court, Southern District of California, or as soon as the matter can be heard in front of the Honorable District Court Judge Dana M. Sabraw, plaintiff, Barbara Hubbard ("plaintiff" or "Hubbard") will move the court for leave to file an amended complaint – a copy of which is attached, as Exhibit A – in order to: 1) dismiss defendant Hometown Buffet, Inc. dba Hometown Buffet #0703 ("Hometown"); 2) dismiss the access barriers related to Hometown (that is, those access barriers located inside the Hometown Buffet restaurant; and, 3) add additional barriers related to the remaining defendant, Lakha Properties - San Diego, LLC ("Lakha").

This motion is based on the pleadings and papers on file in this action, this Notice of Motion, the accompanying memorandum of points and authorities, and the attached [Proposed] Amended Complaint.

I. BACKGROUND

This is a civil rights action brought under Title III of the Americans with Disabilities Act ("ADA") and related California statutes. Plaintiff brought this lawsuit to enjoin the defendants from denying her rights under these federal and state access laws. She seeks (by way of this instant motion) leave to amend her complaint to add additional access barriers and to dismiss one of the defendants.

Counsel for Lakha was notified of Hubbard's desire to amend her complaint on or about January 22, 2008.

II. DISCUSSION

A. The Standard

The Court is well acquainted with the showing required to amend a complaint under Rule 15(a) of the Federal Rules of Civil Procedure (hereafter "Rule 15(a)"), that is, amendment by leave of Court. The federal rules require that "leave shall be freely given when justice so requires." Rule 15(a). Leave to amend pleadings should be freely given unless the opposing party makes a showing of undue prejudice, bad faith or a dilatory motive on the part of the moving party. *See Forman v. Davis*, 371 U.S. 178, 182 (1962); *Martinez v. Newport Beach City*, 125 F.3d 777, 785 (9th Cir. 1997). The policy of granting leave to amend under Rule 15(a) is to be applied with "extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003).

Thus, while "leave to amend should not be granted automatically," the circumstances and/or facts under which a Rule 15(a) request for leave to amend *can be denied* are limited. *Ynclan v. Dept. of the Air Force*, 943 F.2d 1388, 1391 (5th Cir. 1991).

B. The Request to Amend

1. Dismissal of Hometown & Related Access Barriers

As this Court is aware, defendant Hometown has declared bankruptcy. Cognizant that this more than likely means that the subject restaurant will be closing its doors, plaintiff Barbara Hubbard seeks to amend her original complaint in order to dismiss this defendant. She also seeks to dismiss all alleged access barriers relating to the inside of the subject Hometown Buffet restaurant.

There would be no prejudice to Hometown to dismiss it (and the related barriers) from the case, and there has been no bad faith on the part of Hubbard as she named Hometown as a defendant *prior* to its declaring bankruptcy. Likewise, there is no prejudice to the remaining defendant (Lakha) by dismissing Hometown.

Therefore, Hubbard respectfully requests that this Court allow her to amend the complaint to dismiss Hometown, and the access barriers related to this defendant's restaurant.

2. Request to Add Further Barriers Relating to Defendant Lakha

Hubbard also seeks to amend her complaint in order to add new barriers relating to Lakha, which were discovered after the filing of her complaint. Judicial economy warrants having these barriers adjudicated with the others at the same time, as the alternative is to have Hubbard file a second lawsuit, and relating that second lawsuit to this instant matter. Furthermore, by allowing Hubbard to amend her complaint to add these additional allegations of access barriers, Lakha will receive proper and timely notice.

This request is fully in line with a recent Ninth Circuit decision, and, indeed, is actually mandated by this recent decision. In *Pickern v. Pier 1 Imports (US), Inc.*, 457 F.3d 963 (9th Cir. 2006), the Ninth Circuit grappled with the question of whether a defendant had adequate notice of new allegations of ADA violations raised for the first time by plaintiff Pickern in her opposition to defendant's motion for summary judgment. *See id.*, at 965. The Court, agreeing with district court below, ruled that such new allegations, unless *added to the complaint by way of a timely motion to amend*, could not be included in the lawsuit, and Pickern therefore had no standing to challenge them. *See Pickern*, at 968-69. Implicit in the Court's reasoning is the need to provide adequate notice to the defendant of all the ADA violations such that the defendant can thereafter prepare an adequate defense. *See id*.

Such is the **exact case** here. Following the Ninth Circuit's holding in the *Pickern v. Pier 1* case, plaintiff Hubbard seeks to amend her complaint to add new allegations of ADA violations that have been discovered since the filing of her complaint, and of which she has now either personally encountered or has personal knowledge of. Allowing such an amendment will provide adequate notice of these new ADA violations to

Lakha, and allow it to prepare a defense based on **all** allegations of ADA violations.

As with Hubbard's request to dismiss Hometown, the request to add allegations of additional access barriers via an amendment to her original complaint presents no prejudice to Lakha, and is not made in bad faith or as part of some sort of dilatory motive. Furthermore, as explained above, this amendment is actually **required** by the Ninth Circuit.

In summary, Hubbard requests that this Court allow her to amend her complaint as described *supra,* and as allowed by Rule 15(a).

III. CONCLUSION

Accordingly, plaintiff requests the Court **GRANT** an order permitting her to immediately amend her complaint to add newly identified barriers, and dismiss defendant Home Town Buffet, Inc. (and remove from the complaint related to that defendant), as shown in Exhibit A.

Dated: April 8, 2008 LAW OFFICES OF LYNN HUBBARD

/s/ Lynn Hubbard, III, Esquire
LYNN HUBBARD, III
Attorney for Plaintiff Barbara Hubbard